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CHARLES ELMORE CR

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. 257

In the Matter of

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

STATE OF TEXAS,

Petitioner,

vs.

EDWARD E. BROWN, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

KENNETH F. BURGESS,
RAY GARRETT,
GEORGE RAGLAND, JR.,
ROBERT DILLER,
Attorneys for Respondents.

SIDLEY, AUSTIN, BURGESS & HARPER,
Of Counsel.

Chicago, Illinois, October 6, 1948.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

This brief is filed on behalf of the Reorganization Managers under the Plan of Reorganization for The Chicago, Rock Island and Pacific Railway Company, in opposition to the petition of the State of Texas for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, dated June 2, 1948, in *State of Texas* v. *Edward E. Brown et al., Reorganization Managers,* 168 F. 2d 587. That judgment affirmed the Consummation Order and Final Decree entered on December 30, 1947, by the District Court of the United States for the Northern District of Illinois, Eastern Division, in proceedings for the reorganization of The Chicago, Rock Island and Pacific Railway Company and several of its subsidiaries under Section 77 of the Bankruptcy Act.

Texas' petition for certiorari is the last remaining item of litigation involving the reorganization proceedings for

The Chicago, Rock Island and Pacific Railway Company, which extended over a fifteen-year period and resulted in final approval by the Interstate Commerce Commission of a Plan of Reorganization on May 1, 1944, subsequent approval and confirmation of the Plan by the courts, and its successful consummation early in 1948.

The appeal taken by the State of Texas to the Circuit Court of Appeals related to the provision of the Consummation Order and Final Decree (R. 188) for the transfer of the properties of The Chicago, Rock Island and Gulf Railway Company (hereinafter called the Gulf Company), a wholly-owned subsidiary of the principal debtor, to the reorganized company, a newly organized Delaware corporation, pursuant to the Plan of Reorganization (R. 87-88). The Gulf Company is a Texas corporation (R. 177). The properties owned by it prior to January 1, 1948, consisting of three disconnected lines of railroad totalling about 622 miles, are situated in the State of Texas (R. 68). The Gulf Company was a subsidiary debtor in the reorganization proceedings, and the Plan of Reorganization applied to it as well as to seven other subsidiary debtors and the principal debtor (R. 177).

Although the reorganization proceedings were instituted in 1933, the State of Texas, notwithstanding notices sent to it by the Interstate Commerce Commission (R. 89), took no part before either the Commission or the District Court until October 1947, when it asked and was granted leave to file an *amicus* memorandum with the District Court in support of its objections to the Managers' petitions for authority to form a Delaware corporation as the reorganized company and to file an application with the Commission for authority to proceed with the consummation of the Plan (R. 2-3, 44, 45-49). After an adjourned hearing on those petitions, they were granted (R. 50-76, 226). The State of Texas also filed a lengthy "Protest" to the Managers' application

with the Commission, restating its position, which involved the merits of the Plan of Reorganization that the Commission had long since approved and the courts had approved and confirmed, rather than the only matter that was left at that time, the consummation of the Plan (R. 126-138). The Commission rejected Texas' protest and granted the Managers' application (R. 86). The Commission's order issued on December 23, 1947, and the Consummation Order and Final Decree was entered by the District Court, after notice and hearing, on December 30, 1947. At that hearing Texas intervened pursuant to leave granted and restated its objections, which the District Court overruled (R. 86, 154-155, 158-166, 173-174, 177). Texas immediately appealed (R. 212). Its requests for a stay were denied both by the District Court, on December 30, 1947, and by the Circuit Court of Appeals, after oral argument, on December 31, 1947.

The State of Texas contended before the Circuit Court of Appeals that the District Court had no authority under Section 77 of the Bankruptcy Act to order the consummation of the Plan, providing as it did for the vesting of the Gulf properties in a corporation not organized under the laws of Texas and contemplating operation of those properties by such a corporation, in the face of a Texas statute requiring railroads in that state to be owned and operated by a Texas corporation, because in the formulation of the Plan, according to the Texas argument, the Interstate Commerce Commission was bound to comply with the provisions of Section 5 of the Interstate Commerce Act, relating to the voluntary consolidation of railroad properties, and it had not done so. Essentially, as the Circuit Court of Appeals observed (R. 261), Texas sought by its appeal "to go back and review the validity of the plan," which had been approved in final form by the Commission on May 1, 1944, and by the District Court on June 15, 1945. Texas also com-

plained of a denial of procedural due process in the failure of the Commission to send it a copy of the routine amendment of the Reorganization Managers' application for authority to proceed with the consummation of the Plan, filed with the Commission on December 19, 1947 (R. 236), and in the refusal of the Commission to hold a hearing on the application at which it could appear.

The Circuit Court of Appeals, in affirming the Consummation Order and Final Decree, held that the controlling statute was Section 77 of the Bankruptcy Act, under which the provisions of the Plan to which Texas objected were authorized, notwithstanding conflicting state laws; that the provisions of Section 77, both procedural and substantive, had been fully observed, including the requirement of subsection f that upon confirmation of a plan the Commission should, "without further proceedings, grant authority for the * * * transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes" of the Interstate Commerce Act; and that there had been no denial of procedural due process to the State of Texas at any stage of the reorganization proceedings, from their inception on June 7, 1933, down to and including the entry of the Consummation Order and Final Decree on December 30, 1947.

Respondents submit that the ruling of the Circuit Court of Appeals was clearly correct and not contrary to any decision of this Court or in conflict with the decision of any other Circuit Court of Appeals, that the petition for certiorari presents no question of law meriting review by this Court, and that the petition should, therefore, be denied.

I.

THE CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE CONSUMMATION ORDER AND FINAL DECREE.

A. Texas Has Had Due Notice and Opportunity To Be Heard at All Stages of the Reorganization Proceedings.

The reorganization proceedings were instituted on June 7, 1933, and hearings on the Plan began before the Commission in 1936. The Commission in its report and order of December 23, 1947, recites (R. 89):

> "Copies of the proposals and notice of the earlier hearings were duly sent to the Governor of the State of Texas. The State has never intervened in the proceedings nor made any representations to us with respect to the proposals."

Included in the notices sent by the Commission to the State of Texas was specific notice of the provisions of the Plan to which objection is now made (R. 61; 242 I. C. C. at page 445). The Circuit Court of Appeals observed (R. 265):

> "From the beginning, the State of Texas has had notice. Thus, in 1940, the Commission advised the Governor of Texas of the pendency of the proceedings before it and sent to him a copy of its order in 242 I. C. C. 455, in which it commented that, under the proposal, the reorganized company would own all property of the debtor and its subsidiaries including the Gulf Railroad Company. So far as the record discloses, the State took no action in response to this notice, although it had full notice that it was proposed to take over the Gulf properties, contrary, as it claimed, to the conflicting state statutes."*

*Prior to 1940, in three other proceedings before the Commission, Texas had indicated its opposition to the consolidation and unified operation of the Rock Island properties, but that opposition had been overruled. See 193 I.C.C. 395 (1933), 221 I.C.C. 611 (1937), 230 I.C.C. 181 (1938), 233 I.C.C 21 (1939), and *infra*, pp. 10-12.

Four years having passed during which Texas had had notice and ample opportunity to be heard, seven more elapsed before the terms of the Plan were finally fixed, but the state still took no action. The Plan was approved in final form by the Commission on May 1, 1944, and by the District Court on June 15, 1945, voted upon by creditors, and confirmed by the District Court in orders entered May 23, 1947, and June 26, 1947. The District Court's order of approval was affirmed by the Circuit Court of Appeals (157 F. 2d 241), and its orders of confirmation were entered pursuant to that court's instructions (160 F. 2d 942 and 162 F. 2d 257). This Court denied petitions for certiorari from both the approval order and the confirmation order. 329 U. S. 780; 68 S. Ct. 21, 163. Texas delayed its appearance throughout the entire period and came in to object for the first time in October 1947 at a hearing which, as the Circuit Court of Appeals observed (R. 265-266), "had to do not at all with the terms of the plan," but only with formal authorization for the Managers to proceed to carry it out, "after the time for objection to approval had passed and after the time for confirmation had passed."

On the foregoing record the Circuit Court of Appeals was obviously right in concluding that Texas had been given due notice and ample opportunity to be heard prior to its protest filed with the Commission in December 1947, so that the Commission's refusal to hold a hearing on that protest was not a denial of anything to which, at that stage of the proceedings, Texas had a right under Section 77 of the Bankruptcy Act or under the Constitution—"a far cry from deprivation of due process" (R. 266), for, as the court said (R. 266):

> "The attempt to object long after the plan had been approved and long after it had been confirmed, is too tardy an application to deserve consideration and one which we think is not contemplated at that stage under the Bankruptcy Act."

Such an application is not contemplated because, by the express terms of Section 77(f), the Commission is directed, upon confirmation of a plan, to grant, *without further proceedings,* authority for its consummation to the extent contemplated by the plan and not inconsistent with the Interstate Commerce Act. The holding of the Circuit Court of Appeals was in accordance with the statute (R. 267):

> "The only duty of the Commission, on the managers' application, was to assure itself that the transfer and other proposed transactions were those contemplated by the approved and confirmed plan and were not inconsistent with the Interstate Commerce Act. In that situation we think the Commission was entirely justified in declining to entertain the Texas objections which were, in effect, an effort to change the terms of an approved and confirmed plan, to which the State had never objected."

The action of the Commission in sending copies of the Reorganization Managers' application to the governors of the states, including Texas, in which the Rock Island system is located, was in addition to any procedural requirements under Section 77. No further hearings were required on the terms of the Plan, and none was contemplated. The fact that the Commission did not send to Texas a copy of a minor amendment to the application is therefore immaterial.* Texas was permitted to present its objections in writing, but when the Commission found that they were nothing but belated objections to certain substantive provisions of the approved and confirmed Plan of Reorganization, identical with those that had been considered by the Commis-

*The amendment covered three items: (1) it corrected a statement in the original application with regard to employees, so as to inform the Commission that Peoria Terminal Company, reference to which had been inadvertently omitted in the original application, was the only subsidiary debtor that had any employees (compare R. 227 with R. 237); (2) it supplied the Commission with a computation showing the amount of common stock needed to satisfy the claims of general creditors as allowed by the District Court (R. 238); and (3) it substituted for the original Exhibit S (Pro Forma Balance Sheet of the Reorganized Company) an Exhibit S Revised (R. 239).

sion in three prior proceedings involving unification of the Rock Island properties,* it properly concluded that the objections were not such as it could then entertain and that the request for a hearing should be denied.

B. The Controlling Statute Is Section 77 of the Bankruptcy Act, and Its Provisions Have Been Complied With in All Respects.

Notwithstanding its holding that the Texas objections to the terms of the Plan came too late, the Circuit Court of Appeals considered them on the merits and concluded that nothing urged by Texas could have prevailed in the formulation of the Plan, even if it had been presented at the proper time and place (R. 268-269). This conclusion was clearly right under the several decisions of this Court dealing with railroad reorganization under Section 77.

Texas intervened in the reorganization proceedings to object to certain terms of the Plan. It claimed procedural and substantive rights under Section 5 of the Interstate Commerce Act, which deals with voluntary consolidations. The Circuit Court of Appeals quite properly ruled that the authority for the terms of the Plan and the rules governing its formulation were to be sought in Section 77 of the Bankruptcy Act (R. 267, 268-269). "Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress." *Warren* v. *Palmer*, 310 U. S. 132, 137 (1940). See also *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1942), and *Group of Institutional Investors* v. *Milwaukee R. Co.*, 318 U. S. 523 (1942).

The holding that conflicting state laws must yield to the terms of an approved and confirmed plan (R. 261-266) was also in accord with the decisions of this Court in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648 (1935), and *Palmer*

*See *infra*, pp. 10-12.

v. *Massachusetts,* 308 U. S. 79 (1939), as well as *In re New York, New Haven & Hartford R. Co.,* 147 F. 2d 40, 51 (C.C.A. 2, 1945), cert. den. 325 U. S. 884, and *In re Missouri Pacific R. Co.,* 39 F. Supp. 436, 448 (D. C., E. D. Missouri, 1941).

Since the consolidation of properties contemplated by the Plan was plainly authorized by Section 77, subsections b and f, it only remained for the Circuit Court of Appeals to consider whether it was also "not inconsistent with the provisions and purposes" of the Interstate Commerce Act. The decisions of this Court show that the consolidation provided in the Plan of Reorganization was wholly consistent with the provisions of the Interstate Commerce Act, and particularly Section 5 thereof. *Texas* v. *United States,* 292 U. S. 522 (1934); *Seaboard Air Line R. Co.* v. *Daniel, Attorney General of South Carolina,* 333 U. S. 118 (1948); *Schwabacher* v. *United States,* 334 U. S. 182 (1948).

The test of approval under Section 5, as the statute states and as this Court has repeatedly held, is that the acquisition must be "consistent with the public interest," and the Commission must so find after due notice and opportunity for hearing afforded to interested persons. Under Section 77(d) the entire plan must be "compatible with the public interest," and the Commission must so find after due notice and opportunity for hearing afforded to interested persons. "Compatible" means "consistent with." The test, the finding, and due process under the two statutes are essentially the same. The only difference between the two statutes is that Section 5 deals with voluntary consolidations, whereas Section 77 deals with plans of reorganization including involuntary consolidations. The requirements of Section 77 were strictly followed in this case; none of the restrictions of Section 5 were violated by the transfers called for by the Plan; and by these tokens the affirmative provisions and purposes of Section

5 were inevitably satisfied.* To find that the terms of the Plan were "compatible with the public interest," as the Commission did in its reports from 1940 to 1944, was to find at the same time that they were "not inconsistent with" Section 5, for the public interest is also the requirement of that section. The Circuit Court of Appeals so held (R. 268-269), and with the *Seaboard* case as a guide it could not have held otherwise.

Whether acting under Section 5 or under Section 77, the power exercised by the Commission is exclusive and plenary, for the bankruptcy power, no less than the commerce power, is a paramount federal power as against conflicting state laws. *Seaboard Air Line* case, *supra; Schwabacher* v. *United States,* 334 U. S. 182, 187 (1948); *Palmer* v. *Massachusetts,* 308 U. S. 79, 88, 89 (1939); *Continental Bank* v. *Rock Island Ry. Co.,* 294 U. S. 648 (1935). Neither Section 5 nor Section 77 requires the Commission to find that a state of facts, such as the ownership and operation of the Gulf properties by a separate corporation, is an "undue burden on interstate commerce," as a prerequisite to the exercise of an exclusive and plenary constitutional power.

If there were any necessity for a finding expressly under Section 5 of the Interstate Commerce Act that unified ownership and operation of the Rock Island and its subsidiaries, including the Gulf Company, is in the public interest, such

*Petitioner argues, as it did before the Circuit Court of Appeals, that the Commission failed to follow the Plan, and authorized an inconsistency with Section 5, because it made no provision for the Gulf employees. Such provision was made in the order by which the Commission, in a Section 5 proceeding, authorized the Rock Island trustees to operate the Gulf properties until the termination of the reorganization proceedings. See 230 I.C.C. 181 (1938); 233 I.C.C. 21 (1939); *United States* v. *Lowden,* 308 U. S. 225 (1939). The Gulf employees then became employees of the Rock Island trustees until, on January 1, 1948, they became, like all other employees of the trustees, employees of the reorganized company, for whose protection conditions were included in the Commission's order of December 23, 1947. R. 108-109, 117. The Commission could not be asked to deal with a non-existent situation, but it did deal with the existent situation in providing for all employees and in so doing, of course, it observed the Plan and did nothing inconsistent with Section 5.

a finding was in fact made by the Commission in another proceeding. The Rock Island is probably unique as a railroad system with respect to which the Commission has formally found, not once but twice—first under Section 5 and then under Section 77—that unification of ownership and operation would be in the public interest. In addition, the matter of unified operation alone, without regard to ownership, has been before the Commission two times, and in the second of those proceedings it was approved.

The first proceeding, under Section 5, was had on the application filed on May 17, 1932, by the parent company and its subsidiaries, including the Gulf Company, for authority to consolidate their properties in one unified ownership and operation, in which, on August 9, 1933, the Commission entered an order of approval, without prejudice, however, to the reorganization proceedings, which had been instituted on June 7, 1933. At a hearing held in Texas the State failed to appear, after having indicated a desire to protest. The Texas constitution and statutes requiring the maintenance of separate local corporate organizations of railroads operating within that state were, however, considered by the Commission, but it found that unification of ownership and operation in a single corporation was clearly in the public interest and that Congress had empowered it to act, notwithstanding the limiting Texas laws. The anticipated savings and the simplification of operations were fully discussed on the basis of evidence submitted. 193 I. C. C. 395 (1933).

The second proceeding was instituted on December 31, 1935, during the reorganization proceedings, by the trustees of the debtor and its subsidiaries, for authority under Section 5(4) of the Interstate Commerce Act to merge operations of the properties in the several estates. The State of Texas intervened in this proceeding. The Commission in its report discussed the savings that would result from the

merged operations but concluded that the prayer of the petition was not within the language of the statute. 221 I. C. C. 611 (1937).

The third proceeding, again during reorganization, was instituted by the Gulf trustees on November 8, 1937, for authority under Section 5(4) of the Interstate Commerce Act to lease the Gulf properties to the Rock Island trustees until the termination of the reorganization proceedings. The Rock Island trustees applied for authority to enter into and accept such a lease. Again the State of Texas intervened, and a hearing was held. The application was approved. The Commission found that the proposed lease, upon certain terms and conditions, would be in harmony with and in furtherance of its plan for consolidation of railroad properties in general. The objections of the State of Texas, based on its conflicting statutes, were considered and overruled. 230 I. C. C. 181 (1938); 233 I. C. C. 21 (1939). On appeal, taken by the Rock Island trustees with respect to certain of the conditions relating to the Gulf employees, this Court held in *United States* v. *Lowden*, 308 U. S. 225 (1939), that the conditions objected to were authorized by Section 5(4). Consequently, under authority of the Commission's order, the Gulf properties were leased to the Rock Island trustees in September 1939, the Gulf trustees ceased to operate them, and their employees became employees of the Rock Island trustees.

Unified ownership and operation of the Rock Island is now an accomplished fact, as a result of the reorganization under Section 77. It is self-evidently compatible and consistent with the public interest, but in addition had been shown repeatedly to the Commission to be so, and the Commission had found, and knew officially from its own published reports, that it was so. The proposition of the State of Texas that another Section 5 proceeding should have been held to make the nonessential finding that the Gulf

corporation was a burden on interstate commerce, or that an express finding to that effect was required in the reorganization proceedings, before the Plan could properly be approved and put into effect, does not merit consideration by this Court.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT OR WITH ANY DECISION OF THIS COURT.

The petitioner has cited *In re Central Railroad Company of New Jersey,* 136 F. 2d 633 (1943), cert. den. 320 U. S. 805, *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388 (1938), and *Windsor* v. *McVeigh,* 93 U. S. 274 (1876), in support of its argument that it was denied procedural due process. They are all cases holding that notice and opportunity to be heard are essential. The facts heretofore recited, which were fully considered by the Circuit Court of Appeals, show that the rule of those cases was never violated, for at no time when Texas was entitled to notice and at no time when it had a right to be heard was it denied. The State of Texas never availed itself of its rights. Notwithstanding that fact, when it finally made an appearance after its right to be heard on the terms of the Plan had expired, it was given special consideration, both by the Interstate Commerce Commission and the District Court.

In the construction of Section 77, it is claimed that the Circuit Court of Appeals held contrary to the ruling of this Court in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939), and in conflict with the ruling in *Benton* v. *Callaway,* 165 F. 2d 877 (C. C. A. 5, 1948), cert. granted 68 St. Ct. 736. Neither contention is correct.

Abandonment of service during the course of reorganization was involved in *Palmer* v. *Massachusetts,* and the

holding of this Court was that the District Court could not, in prejudice to a state proceeding for abandonment that had been duly instituted and was in progress, independently and as a matter of administration of the debtor's estate, authorize and direct it to abandon the contested service. We are not concerned with administration of the debtor's estate in this case, but with the validity of the terms of an approved and confirmed plan of reorganization. As to such plans, this Court was careful to state in *Palmer* v. *Massachusetts* (308 U. S. 88, 89):

> "In view of the judicial history of railroad receiverships and the extent to which §77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road."
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> "It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of reorganization plans which, on approval by the Commission, do supplant state authority."

The holding of the Circuit Court of Appeals in the present proceeding, like those in the *New Haven* case, 147 F. 2d 40, 51 (C. C. A. 2, 1945), cert. den. 325 U. S. 884, and the *Missouri Pacific* case, 39 F. Supp. 436, 448 (D. C., E. D. Missouri, 1941), was in compliance with, rather than contrary to, the views of this Court expressed in *Palmer* v. *Massachusetts.*

The holding in *Benton* v. *Callaway* has no bearing whatever on the present litigation. The ruling of the majority in

that case was that a reversionary fee simple interest in a railroad, owned by a corporate lessor not in bankruptcy, was not a part of the bankrupt lessor's estate that was subject to the exclusive jurisdiction of the bankruptcy court under Section 77, that the question whether acceptance of an offer to purchase the lessor's interest required the approval of all stockholders of the lessor, or only a majority in interest, was a matter of state law, and that the bankruptcy court had no jurisdiction to enjoin a suit brought in an appropriate state court for the determination of that question. In the Rock Island proceedings, the Gulf Company was one of the subsidiary debtors in the reorganization proceedings, and the Plan was mandatory with respect to the consolidation of the properties, irrespective of state law. In the Central of Georgia plan involved in *Benton* v. *Callaway*, the bankruptcy power was not asserted to require property of an owner not in reorganization to be conveyed to the reorganized company, but the matter was left to the agreement of the parties, to offer and acceptance.

For the foregoing reasons, respondents pray that the petition for certiorari be denied.

Respectfully submitted,

KENNETH F. BURGESS,
RAY GARRETT,
GEORGE RAGLAND, JR.,
ROBERT DILLER,
Attorneys for Respondents.

SIDLEY, AUSTIN, BURGESS & HARPER,
Of Counsel.

Chicago, Illinois, October 6, 1948.

CERTIORARI DENIED